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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932

NO. 313

LONE STAR GAS COMPANY,

Appellant

Versus

THE STATE OF TEXAS, ET AL.,

Appellees

APPEAL FROM THE DISTRICT COURT OF CIVIL

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

NO. 313

LONE STAR GAS COMPANY,
Appellant

Versus

THE STATE OF TEXAS, ET AL,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

APPELLEES' PETITION FOR REHEARING, AND ALTERNATIVE MOTIONS FOR AMENDMENT, SUPPLEMENT, AND CLARIFICATION OF OPINION AND JUDGMENT

TO SAID HONORABLE COURT:

Appellees respectfully petition this Honorable Court to set aside its opinion and judgment entered herein on May 16, 1938; and pray that Appellees be granted a rehearing herein, and that the judgment of the Court of Civil Appeals be affirmed; and, in the alternative, pray that this Honorable Court amend, supplement, and clarify its opinion and judgment in the respects hereinafter indicated.

Counsel for Appellees certify that this petition, and the motions and arguments herein contained, are presented in good faith and not for delay.

For grounds Appellees present the following points:

I. This Honorable Court erred in reversing, and in not affirming, the judgment of the Court of Civil Appeals.

II. This Honorable Court erred in holding that the Court of Civil Appeals based its judgment solely upon the view that Appellant failed to make a necessary and "proper segregation of interstate and intrastate properties and business." In actuality the Court of Civil Appeals did not base its judgment solely upon that view, but actually and expressly based its judgment upon a thorough, mature, and deliberate consideration of all evidence in the record, including that bearing upon the overall and unsegregated properties and operations; and the Court of Civil Appeals only adverted to the absence of such a proper segregation as an alternative and cumulative ground for its judgment, in view of the Company's insistence (overruled by the state appellate courts, and now by this Court) that the order was void *in toto* for impinging in part upon the federal commerce clause. Quotations and summaries from the opinion of the Court of Civil Appeals, supporting this point, will be found in the argument hereinbelow.

III. This Honorable Court erred in remanding the cause to the Court of Civil Appeals "for further proceedings not inconsistent with" the opinion of this Court.

IV. This Honorable Court erred in not specifying with greater particularity what "further proceedings" the Court of Civil Appeals is authorized to take in this cause "not inconsistent with" this Court's opinion, and what restrictions, if any, are put upon the "further proceedings" of the Court of Civil Appeals. Appellees, therefore, respectfully pray that, if the cause is to be reversed and remanded (which they do not think it should be) this Court clarify its opinion so as to indicate which of the two inconsistent constructions, set out below, is correct.

(1) Appellees represent that, while they do not conceive that this Honorable Court's opinion is fairly open to the construction hereinafter next mentioned, yet Appellant and its counsel have, immediately following announcement of this Court's decision, publicly, unqualifiedly, and emphatically contended, in the press and elsewhere, that this Court's opinion and judgment can mean only that the Court of Civil Appeals must, and cannot consistently with this Court's opinion and judgment do otherwise than to, render final judgment affirming the judgment of the District Court.

Appellees further have been reliably informed that at least two of the three Justices of the Court of Civil Appeals have expressed the view that this Court's opinion is probably open to the above construction, or at least that it is ambiguous and subject to grave doubt upon that point.

(2) It is Appellees' construction of this Court's opinion and judgment, that, on the contrary, the

Court of Civil Appeals is not by this Court's opinion and judgment required to affirm the judgment of the District Court.

For our views as to some of the courses we think the Court of Civil Appeals is and should be authorized to pursue, consistently with this Court's opinion and judgment, see our argument hereinafter.

It is Appellees' view, further, that this Court's opinion and judgment do not, and certainly should not, require the Court of Civil Appeals to affirm the judgment of the District Court, for the various reasons set forth in subsequent argument, and for the further reason that these Appellees, as Appellants in the Court of Civil Appeals, assigned numerous errors of state law committed in the course of the District Court trial, which errors under the state law would in any event preclude the proper rendition of final judgment based upon the jury's verdict below, and which assignments the state appellate courts did not pass upon because deemed unnecessary to the disposition of the case which they actually made, and thought proper, but which assignments these Appellees are entitled to have passed upon, and will have passed upon, by the state appellate courts if the opinion and judgment of this Court do not preclude such further review and action below by peremptorily requiring affirmance of the District Court's judgment as contended for by Appellant. If any of these Appellees' assignments of error under the state law be sustained by the state appellate courts, then Appellees would at least be entitled to a reversal and remand to the District Court for retrial upon the merits, rather

than having final judgment rendered against these Appellees upon a record shot through with numerous reversible errors of state law, prejudicial to these Appellees only, which assignments have not been considered or passed upon by the state appellate courts.

V. This Honorable Court erred in stating, at page 5 of its opinion, and in citing *United Gas Public Service Co. vs. Texas* (decided February 14, 1938) and *Post vs. State*, 106 Texas 500, 501, as supporting the statement, that "Under the state practice the issues of fact were determined in the trial court and on the appeal the Court of Civil Appeals had no authority to make findings of fact." The *Post case* lays down the true general rule; but, as will be explained in argument hereinafter, the Court of Civil Appeals has not in this case violated the rule of the *Post case*, nor made any fact findings, but has only passed upon the *law question* of whether the evidence as a whole was "clear and satisfactory" so as to overturn the presumed validity of the Commission's findings and order, and raise any issues of fact. Appellees, therefore, pray that the paragraph on page 5 containing such statement and citations be stricken from the Court's opinion, as being unnecessary to the decision, and as being probably misleading in the future, prejudicially to these Appellees, to the state courts as to this Court's attitude upon this question of exclusively state law.

VI. This Honorable Court erred in stating in its opinion, at page 12, sixth and fifth lines from the bottom, that the case was submitted to the jury "under a proper instruction as to the burden of proof resting upon appellant"; and, on page 14, eighth and

ninth lines from the top, that Appellant's evidence "had been properly submitted to the jury." Appellees respectfully request this Court to strike such language from its opinion for the reason that, as will be demonstrated in subsequent argument, the language is founded upon an apparent misunderstanding of the well-established and settled state practice under the state constitution, statutes, and decisions, as to the judicial method of approach in determining the legal sufficiency of the evidence to overturn the *prima facie* validity of the findings and orders of the Commission. That method of approach is, as we have tried to make plain, and as we will endeavor to make even plainer, to review the evidence first upon the preliminary question of law as to whether the evidence is "clear and satisfactory" or "clear and convincing" so as to raise issues of fact as to whether the rate is "unreasonable and unjust" within the meaning of Article 6059, or "confiscatory" in violation of the federal Fourteenth Amendment and the equivalent provisions of the state constitution.

This preliminary question of law is one addressed to the *judicial mind;* and, until it is resolved by the judges favorably to the complainant, there is no question of fact addressed to the jury as triers of the facts. If on this preliminary legal test it be determined that the evidence is sufficiently "clear and satisfactory" or "clear and convincing" to raise issues of fact as to unjustness and unreasonableness, or confiscation, (which was *not* the situation in this case) the questions of fact thus raised would properly be submitted to the jury upon a mere preponderance of the evidence.

If the trial judge, as here, erroneously concludes, on this preliminary question of law, that the evidence is "clear and satisfactory," then his judgment in that respect is subject to revision on appeal—where, again, the question is resolved as one of law rather than of fact; though the appellate courts may, as this Court has in *United Gas Pub. Serv. Co. vs. State of Texas* said it does, analyze the facts only for the purpose of enabling them to decide the law question.

Appellees, therefore, respectfully request this Court to strike the above-quoted language from its opinion, as well as that referred to in Point V, supra, because such language, if allowed to stand, will in all probability erroneously and needlessly raise doubts in the minds of the Texas Bench and Bar as to whether this Honorable Court intends to hold that the settled state law and practice on these points is objectionable upon federal constitutional grounds, whereas we do not believe this Court intends to pronounce any federal interdiction upon the propriety of those well-established points of state law.

VII. This Honorable Court erred in giving any effect whatever to the jury's verdict, contrary to the state law, and in holding that such verdict "could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury."

In Appellees' view, the questions of whether the evidence was sufficient and proper to go to the jury

at all, and of the sufficiency thereof to support the jury verdict, and as to what effect, if any, should have been given the jury verdict, and the standards upon which the jury verdict could be set aside, and of the interpretation of the jury's verdict, are all questions of exclusively state law, upon which this Court, under its previous decisions, should follow the decisions of the highest state courts in this case.

As this Court correctly held in *United Gas Pub. Serv. Co. vs. State of Texas*, February 14, 1938, "The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements." If the procedure followed by the state courts in this case does not meet the requirements of any federal constitutional provision, this Court should, as it has not done, point out wherein such procedure does infringe upon some specific federal constitutional right of Appellant. And, if the Court of Civil Appeals erroneously reviewed the evidence solely from the standpoint of segregation (as we believe it did not), then it seems to Appellees that the proper course would be for this Court, without remanding to the state courts, to rectify such error in its own review of the evidence, upon the proper overall basis, and determine in the usual way whether the evidence does or does not show confiscation with the degree of clarity required in this Court's previous decisions.

VIII. At page 4 of the opinion, line 9, the Court uses the word "interstate" property, whereas we think it intended the word "intrastate."

BRIEF AND ARGUMENT

There cannot be the slightest doubt that this Honorable Court has, in division "First" of its opinion, correctly upheld the contentions of the State and Commission that the Company's rights under the Federal Commerce Clause have not been infringed upon by the Commission's order. To have held otherwise would have thrown insurmountable obstacles in the path of the State's undoubted powers of appropriate local gas rate regulation, and we are gratified that this Court has thus upheld the arm of the state regulatory body in this respect.

We are also gratified that this Court has, in our opinion, correctly held that the Company received a full hearing, and was accorded all requisites of due process, before the Commission.

This Honorable Court, on page 13 of its opinion, adverts, however, to the "insistence" of the State, and, on page 14, to the State's "pressure" in the District Court, upon the point that there should be a proper segregation between that which was within and without the state's regulatory power and between Oklahoma and Texas properties and operations. This language upon this point creates in our minds the belief that this Honorable Court is erroneously under the impression that the State unjustifiably shifted its fundamental position in the courts from that taken before the Commission.

Such an impression is unjustified, and we do not believe that the State and Commission should be either criticized, or visited with the unjust penalty of

a reversal, for taking a position before the courts, which *the Company itself* had driven them to, and made necessary, by its unjustifiable course of raising no contention as to interstate commerce before the Commission, but injecting it for the first time into the judicial proceedings, first in the federal district court (R. III, 2187), and then in the state district court (R. I, 123, et seq).

The question of segregation would not have been in this case at all had it not been for the Company's injecting the interstate commerce issue into the case for the first time before the federal and state trial courts.

From the first time this claimed defense was interposed by the Company in the federal and state trial courts, this issue has, by the State and Commission, and by all reviewing courts, been considered the paramount question in the case.

This fact explains why the Court of Civil Appeals placed so much emphasis upon the matter of segregation. That Court first determined (correctly, as now adjudged by this Court) that there was no interstate commerce involved, and that the Company's rights under the Federal Commerce Clause, therefore, were not infringed upon by the Commission's order; but the Court of Civil Appeals then took the *alternative position*, that if it were in error in that view—a matter upon which this Court had the ultimate jurisdiction to pass—the Company, nevertheless, had failed to prove its case with the requisite quantum and character of proof, because of its indisputable failure to submit any tenable basis of segregation.

This Honorable Court has determined that the Court of Civil Appeals based its judgment *solely* upon the absence of such a segregation, and that the Court of Civil Appeals failed to give *any* consideration to the Company's overall, or unsegregated, evidence in determining the legal insufficiency thereof.

We respectfully insist that this Court was in error in so determining. We know as a fact that the Court of Civil Appeals did give full, deliberate, and careful consideration, and due weight, to all evidence in the record—including the Company's overall and unsegregated evidence as well as the evidence of both parties upon attempted segregations; and this fact is plainly reflected by language appearing in the opinion of the Court of Civil Appeals, which this Court has apparently overlooked, or to which at least this Court has not given sufficient weight.

The reversal also overlooks the well-established general principle of appeal and error, that not only need the lower court not state in its opinion all of the grounds for its judgment, but that such judgment, if correct, will be upheld notwithstanding the reasoning on which it was based may be *totally erroneous*. We conceive that the *judgment* of the Court of Civil Appeals, if not its opinion, was entirely correct—and that this Court, instead of now reversing and remanding, should follow its usual course of reviewing and analyzing the evidence upon the correct basis, and of determining whether as a matter of law it does or does not show confiscation with the requisite degree of clarity.

In the opening statement by the Court of Civil Appeals (R. V, 3333-3336), that Court summarized plainly from an overall basis. At R. V, 3335, the Court speaks plainly from an overall standpoint in saying: "Appellee (Company) did not meet this burden and quantum of proof and the trial court erred in overruling the Commission's motion for an instructed verdict and for judgment declaring the rate to be valid."

And, again, in concluding the opinion (R. V, 3369), the Court plainly speaks from the standpoint of overall proof when it says: "The calculations, estimates, and opinions of its (Company's) experts show a studied effort on the part of appellee (Company) to charge large items as operating expenses and depreciation at war with the actual experience of the Company and *we find no proof* which would authorize the trial court to submit any issue to the jury, but find that appellee wholly failed to meet the burden of proof placed upon it, and to show by clear and satisfactory evidence that the rate was confiscatory, unjust and unreasonable as to it."

Furthermore, the Court in reaching the above-quoted and oft-stated conclusion, unquestionably reviewed, and gave full effect to, the Company's overall evidence, as plainly reflected in each of the following portions of its opinion:

In its analysis and discussion of the "Interstate Commerce Issue" (R. V, 3336-3352).

And in analyzing and discussing the case from the standpoint of "Confiscation of Property" and "Legal

Sufficiency of Evidence to Show the Rate Confiscatory or Unreasonable and Unjust," the Court plainly speaks exclusively from the viewpoint of the overall evidence, unmixed with any question of segregation, in analyzing the overall evidence upon the following matters:

The Company's overall appraisals of transmission construction costs, and the arbitrary addition of 20% to actual costs for contingencies (R. V, 3362-3363); the Court expressly pointing out that, "Where they relate to the same property, (i. e., overall) the appraisals are in every way comparable."

The evidence was likewise obviously reviewed from the overall standpoint exclusively, in analyzing and condemning the Company's "Depreciation Allowances" (R. V, 3363-3364), "Federal Taxes" (R. V, 3364), "Management Fees" (R. V, 3365), "New Business Expenses" (R. V, 3365-3366), "Cancelled and Surrendered Leases" (R. V, 3366), "Regulatory Commission and General Expenses" (R. V, 3366-3367), "Going Value" (R. V, 3367-3368), and "Rate of Return" (R. V, 3368-3369).

If, as we believe, it is plain that, notwithstanding the emphasis placed by the Court of Civil Appeals upon the issue of segregation, by reason of its view that the interstate commerce question, determined by it adversely to the Company, was the paramount issue in the case, which issue of segregation was inseparably connected with the interstate commerce issue, the Court of Civil Appeals has nevertheless actually reviewed all evidence in the record—that bearing upon

an overall basis as well as upon segregation—then we do not believe there is any necessity for a reversal and any further proceedings by the state courts, in view of the determination by the state appellate courts that the evidence as a whole, segregated and unsegregated, was legally insufficient to raise any fact issues as to confiscation.

But if we be in error, as to our view that the state appellate courts made their determinations upon an overall basis as well as the alternative segregation bases, then, since this Court has now finally determined that there was no need of segregation, certainly the state appellate courts should be given an opportunity to review the record again, approaching the question of legal sufficiency of the evidence exclusively upon the basis on which the Commission made its findings and order.

In no event, in the present state of the case, should this Court enter any judgment and opinion *limiting* the state appellate courts to the rendition of a judgment affirming the judgment of the trial court. We do not believe this Court has done so, or intended to do so. That would not only cut off the state appellate courts from making their determinations exclusively upon an overall basis (as now held proper by this Court) as to the legal sufficiency of the Company's evidence to raise fact issues, but would also preclude them from considering and passing upon the numerous assignments, presented before those courts by the State and Commission, as to errors of procedure and of substance under the state law committed in the District Court—which assignments of error the state ap-

pellate courts have not yet considered nor passed upon because found *at that time* not necessary in view of the disposition made of the case in those courts.

Furthermore, for this Court now to enter an opinion and judgment ending the case and requiring the state appellate courts to affirm the judgment of the District Court would upset all of our state statutes, and highest state court decisions, as to procedure, rules of evidence and burden of proof in judicial proceedings wherein attacks are made upon orders and findings of the Commission.

This Court has always held that upon questions covered by state constitutional and statutory provisions this Court will enforce the state law as interpreted by the highest state courts. *Midland Realty Co. vs. Kansas City P. & L. Co.*, 300 U. S. 109, 112-113, 81 L. Ed. 540, 543-544. And in the very recent and important case of *Erie R. Co. vs. Thompkins*, decided April 25, 1938, 82 L. Ed. Adv. Sheets, p. 787, this Court has extended this principle also to questions of general law.

We do not believe it is the intention of this Court, in the present case, to depart from this principle and to make such a far-reaching invasion into the undoubtedly exclusive province of state law, which would necessarily result if the Company's interpretation of this Court's opinion be adopted, as limiting the state appellate courts in this case to the rendition of a judgment affirming the judgment of the District Court and finally striking the rate down as being con-

fiscatory. If this Court had intended that result, we believe it would, as it has not done, have said so plainly. *Rogers vs. Hill,* 289 U. S. 582, 587, 77 L. ed. 1385, 1389.

Some of the principal additional reasons why we do not believe this Court intended to so limit the "further proceedings" which the Court of Civil Appeals is required to take, are as follows:

Under that interpretation, this Court's undoubtedly sound holding upon the interstate commerce question would be purely dictum; for the rate order would by this Court's opinion and judgment thus be finally stricken down, solely upon the ground that it is found confiscatory, and there would be no need to pass upon the interstate commerce questions.

And, furthermore, there is nothing in this Court's opinion even suggesting that this Court has reviewed and determined the legal sufficiency of, the evidence to show confiscation with the required degree of clarity established as requisite by this Court's previous decisions, nor the sufficiency of such evidence to support the jury's verdict and the District Court's judgment in this case—whereas, in confiscation cases this Court has always heretofore expressly reviewed the evidence in detail and determined its legal sufficiency or insufficiency to support a finding of confiscation. Thus the effect of such a holding would be to compel, as a supposed federal constitutional right of the Company, the substitution of the jury's verdict and trial court's judgment for the expert judgment and discretion of the Commission, which this Court has held was arrived

at in a regular manner and upon a proper basis; and, contrary to the state law as declared in the opinion of the highest state courts, to forbid *those* courts to determine the sufficiency of the evidence to support that verdict and judgment; and, contrary to this Court's previous decisions, to finally strike the rate down as being confiscatory, upon a jury's verdict, without this Court itself, or any other appellate court, determining upon proper analysis that the evidence was such as to *require* a finding of confiscation under the onerous rules heretofore laid down and applied, in cases of claimed confiscation, by this and all other courts.

If this Court's judgment and opinion be construed as requiring the Court of Civil Appeals to render final judgment affirming the judgment of the District Court, that would write *finis* to the case, not only without this Court's having reviewed and determined the sufficiency of the evidence on any basis to show confiscation with the requisite degree of clarity, but also without giving any of the state trial or appellate courts a fair opportunity to make that determination exclusively from the overall basis which this Court has now held necessary. Thus all the expensive expert labors of the Commission, which this Court has after five years of litigation now found to have been regular and upon the proper basis, would now be finally stricken down and held for naught upon a mere unsupported jury verdict. That would sound the death knell of all rate regulation in Texas.

And, finally, we find it impossible to believe that this Court has, contrary to its numerous and uniform

prior decisions, invaded the exclusive province of the state courts in determining and applying the state law, without at least pointing out in its opinion wherein such state law and procedure violate any federal constitutional rights of procedural due process of the Company.

For fear this Court may not fully understand the state law and procedure established by our state statutes, and the uniform decisions of our highest state courts, applicable in this case, we now give in brief outline what our state decisions establish on those points:

The Commission is composed of impartial, skilled, and experienced rate experts, having at their command the necessary services of legal experts, accountants, engineers, and other technicians, and are, therefore, equipped in a special way to deal intelligently and justly with the intricate and difficult technical problems of rate-making.

If it were not so, and a trial court or jury were better equipped to fix just and reasonable rates than the Commission, we would do much better to eliminate the Commission entirely, and save the delay and expense of proceedings before it, by allowing the courts to fix the rates in the first instance. But we do not think there is anything in the Federal Constitution which should be so interpreted as to drive us to the necessity of doing that.

In order to prevent the results of the Commission's expert labors from being set aside and supplanted too

easily by the judgment and discretion of courts or juries less adequately equipped for exercising discretion in such matters, it is necessary that some degree of verity be accorded the Commission's work over and above that which would attach to it if their findings and orders could be overturned upon a mere "preponderance of the evidence" and the judgment and discretion of the trial court substituted therefor. *State vs. Southwestern Bell Tel. Co.*, 233 S. W. 425, *N. Y. & Queens Gas Co. vs. McCall*, 245 U. S. 345, 347-348; 62 L. ed. 337, 340-341.

To provide such a safeguard for the expert labors of the Commission, the State Legislature has provided (Article 6059) that the orders of the Commission may be set aside as unjust, unreasonable, or confiscatory only by the complainant's presenting "clear and satisfactory evidence" requiring such action.

The question of whether the evidence submitted is "clear and satisfactory" is one of law addressed to the *judicial minds* of the reviewing judges, and not to their minds as a question of fact.

At the threshhold of a suit to set aside an order of the Commission, therefore, the reviewing trial judges (and, subsequently, the appellate judges) are faced *in limine* with the necessity of deciding the *preliminary law question* as to whether the complainant's evidence as a whole measures up to that quantum and character of proof which may properly be characterized as "clear and satisfactory," within the meaning of the statute. If the evidence meets that preliminary legal standard, then fact questions are raised, and are properly to be

submitted to the jury, *upon a mere preponderance of the evidence.* *R. R. Com. of Tex. vs. Shupee*, 57 S. W. (2) 295, 301, Aff. 123 Tex. 521, 528, 73 S. W. (2) 505, 508; *R. R. Com. of Tex. vs. Galveston Chamber of Commerce*, 105 Tex. 101, 115, 145 S. W. 573, 580; *Humble O. & R. Co. vs. R. R. Com. of Texas*, 94 S. W. (2d) 1197, 1199, writ refused; *City of Austin vs. Austin Cemetery Ass'n.*, 87 Tex. 330, 338, 28 S. W. 528, 531; *Smith County O. & G. Co. vs. Humble O. & R. Co.*, 112 S. W. (2) 220; *State of Texas vs. Lone Star Gas Co.*, 86 S. W. (2) 484, Writ ref.; *United Gas Pub. Serv. Co. vs. State of Texas*, 89 S. W. (2) 1094, Writ ref.

Thus it is by no means made impossible, or unduly difficult, for the complaining party to establish his case by submitting evidence which is based upon satisfactory factual data, and which thus meets the requirements of intelligent judicial appraisal. Having once successfully passed this preliminary judicial scrutiny, the evidence is then properly to be submitted to the jury in the usual way.

We do not contend that jury fact questions cannot be raised in any rate case, nor that they *could* not have been raised in this case—by the submission of evidence clear and satisfactory in character. Our only contention is that the evidence in this case was not of that clear and satisfactory nature which, only, the statute provides shall be submitted to a jury for determination of the fact questions.

There is nothing in this procedural and evidentiary rule as to burden of proof inconsistent with due process under the Fourteenth Amendment.

If the evidence does not appear to the reviewing judges to be "clear and satisfactory," as a matter of law, then there are no fact issues raised to be determined, and the presumptively valid order of the Commission successfully withstands the attack as a matter of law. This is the situation presented by this record.

In this instance, the Court of Civil Appeals has correctly determined, as a matter of law, that the evidence as a whole was legally insufficient to raise any fact issues to go to the jury, and the Court of Civil Appeals, has, therefore, made no fact findings whatever, nor given any effect to the jury's verdict—because of the absence of legally competent evidence to support it. The state courts' determinations upon these questions of state law should be scrupulously respected by this Honorable Court, as they have always been.

It is upon these grounds that we request this court to strike from its opinion, as being inapplicable, the paragraph on page 5 citing and quoting from the case of *Post vs. State,* and *United Gas Pub. Serv. Co. vs. State of Texas.*

Furthermore, since the question of whether the evidence is "clear and satisfactory" is one of law for the judge, and would have been already passed upon by the judge before the evidence could be properly submitted to the jury, it would be improper, even in a case which could properly go to a jury, to instruct the jury, as was done in this case, that the burden is upon the complainant to prove his case by "clear and satis-

factory evidence," and it was, therefore, improper and erroneous for this Court upon this question of state law to say, at page 12 of the opinion, that the case was submitted to the jury "under a proper instruction as to the burden of proof resting upon appellant."

And, because the Court of Civil Appeals properly found that the evidence was as a matter of law insufficient to raise any fact issues, we believe it also improper upon this question of state law for this Court to state, at page 14 of its opinion that the Company's overall evidence "had been properly submitted to the jury."

This Honorable Court has not said, or even intimated, in its opinion that the above procedural rules, which are but mere adjective rules of evidence, or burden of proof, in any way impinge upon Appellant's federal constitutional rights; and it is clear, under this Court's decisions, that they do not so offend. *Luria vs. United States,* 231 U. S. 9, 58 L. Ed. 101. Yet Appellant is insisting and will insist, erroneously, that this is the necessary effect of this Court's decision.

Neither does the Fourteenth Amendment guarantee to Appellant the right of a trial by jury—the State may consistently with the Federal Constitution withhold a jury trial entirely, or grant one upon such terms and conditions as it may see fit. *United Gas Pub. Serv. Co. vs. State of Texas,* decided by this Court February 14, 1938; *Walker vs. Sauvinet,* 92 U. S. 90, 23 L. Ed. 678; *Maxwell vs. Dow,* 176 U. S. 581, 587, 44 L. Ed. 597, 599; *Frank vs. Mangum,* 237 U. S. 309, 59 L. Ed. 969.

Neither is there anything in the Federal Constitution which requires the State to maintain a distinction between the functions of the jury and those of the court. *C. R. I. & P. R. Co. vs. Cole,* 251 U. S. 54, 64 L. Ed. 133; *Palko vs. Connecticut,* No. 135, decided by this Court December 6, 1937.

As correctly said by this Court in *United Gas Pub. Serv. Co. vs. State of Texas,* supra, "The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements."

If this Court had intended to hold that such state procedure violates any of Appellant's federal constitutional rights, undoubtedly it should and would, as it has not done, have said so plainly in its opinion in this case.

If the cause is to be remanded at all (which we do not think it should be), then what we think this Court intended to be done, and what certainly should be done and made plain, is to leave the Court of Civil Appeals free to review the entire evidence anew, upon an overall basis, in accordance with and in the light of this Court's present judgment and opinion, eliminating the interstate commerce and segregation questions; applying to such evidence the tests and standards provided by our state court procedure and decisions, and to arrive at its own independent determination as to whether the overall evidence was sufficient to raise any fact issues to go to the jury upon the question of confiscation, or was sufficient to support the jury's verdict; and, either to render final judgment, or to remand the

cause to the District Court for retrial upon the merits, as may be determined to be proper under our state laws and decisions.

In conclusion we respectfully request that if at all possible the Court act upon this petition for rehearing before the adjournment of its present term on May 31, 1938. This is especially desirable to the end that the Court of Civil Appeals may make the appropriate disposition of the case before its adjournment for the term about the middle of July of the present year.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 313.—October Term, 1937.

Lone Star Gas Company, Appellant, *vs.* State of Texas, The Railroad Commission of Texas, et al.	Appeal from the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

[May 16, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Railroad Commission of Texas brought this action, under Article 6059 of the Revised Civil Statutes of Texas, to enforce the Commission's order of September 13, 1933, prescribing the rate for domestic gas supplied by appellant, Lone Star Gas Company, to distributing companies in Texas. The rate was fixed at not to exceed 32 cents per thousand cubic feet instead of the existing charge of 40 cents. The District Court of Travis County, upon the verdict of a jury finding the prescribed rate to be unreasonable, denied relief and enjoined the Commission and the state officials from enforcing the Commission's order. The Court of Civil Appeals reversed the judgment and held the order to be valid. 86 S. W. (2d) 484. Rehearing was denied. 86 S. W. (2d) 506. The Supreme Court of the State refused writ of error and the case comes here on appeal.

Appellant, a Texas Corporation, operates about 4,000 miles of pipe lines located in Texas and Oklahoma through which it transports natural gas to the "city gates" of about 300 cities and towns in those States and sells and delivers the gas in wholesale quantities to distributing companies. The latter companies, with two exceptions, are affiliated with appellant, being subsidiaries of the same parent corporation. One of appellant's pipe lines extends from a gas field in Wheeler County, Texas, a part of the Texas Panhandle field, crosses the southwestern corner of Oklahoma, is tapped for gas delivered at Hollis, Oklahoma, and returning into Texas runs generally in a southeasterly direction to various Texas points. At Oklaunion, Texas, the line is tapped by a branch line

which extends northward into Oklahoma and supplies certain cities in that State. At Petrolia, Texas, the line is joined by lines coming from Oklahoma.

The Commission dealt solely with the rate for the gas delivered in Texas. This consisted (1) of gas produced or purchased in Texas and transported and delivered entirely within that State, being upwards of 70 per cent. of the total; (2) that produced or purchased in Oklahoma and transported through appellant's lines into Texas which, on appellant's calculation, amounted at the average of the five-year period 1929-1933 to about 11 per cent. of the total; and (3) that produced or purchased in the Panhandle field in Wheeler County, Texas, amounting on the same computation to about 17 per cent. of the total.

The Commission gave a full hearing in which appellant participated. The Commission treated appellant's properties as an integrated system, and in that way "considered the Oklahoma properties and operations and the effect thereof on the revenues and expenditures within Texas", fixing the rate "for application within the jurisdiction of Texas". Appellant made no objection to that course. The Commission determined the rate base as of December 31, 1931, at $46,246,617.53, being $4,674,285.91 for production properties and $41,572,331.62 for transmission properties. The Commission considered appellant's revenues and expenses for a six-year period, 1927 to 1932, and made the rate on the basis of six per cent. as a minimum fair rate of return.

Appellant brought suit in the federal court, attacking the rate on constitutional grounds, but that court stayed its proceedings when the present action was brought by the Commission. In this action appellant first submitted pleas to the jurisdiction of the state court, and pleas in abatement, which were overruled. In its answer appellant attacked the rate order upon the grounds (1) that transportation and sales to local distributing companies through high pressure lines "of gas produced in Wheeler County, Texas, and transported into and through Oklahoma and back into Texas without interruption" constituted interstate commerce, and that the order violated the commerce clause of the Federal Constitution; and that the same was true of the gas produced or purchased by appellant in Oklahoma and transported in high pressure lines to Texas for sale and delivery there; and (2) that the pre-

scribed rate was confiscatory and repugnant to the due process clause of the Fourteenth Amendment.

The trial on the merits, before a jury, was begun on June 11, 1934, and was entirely *de novo*. The State introduced in evidence the Commission's order (to which appellant unsuccessfully objected as being void in its entirety because applicable to its interstate business), the stay order granted by the federal court, and a stipulation that the prescribed rate had not been put into effect. The record of evidence before the Commission was offered but was not received. On this formal proof the State rested. Appellant moved for a directed verdict which was denied and appellant then went forward with its evidence. The report and findings of the Commission upon which the order was based were introduced. In rebuttal of the Commission's findings, appellant submitted an appraisal of its properties as an integrated operating system as of January 1, 1933. That appraisal was voluminous, showing $73,983,405.57 as the cost of reproduction new. Evidence was offered as to the amount to be deducted for accrued depreciation and on that basis the fair value was claimed to be $69,738,021.16. The appraisal was later brought down to May 1, 1934, showing an increase in material and construction costs between January 1, 1933, and May 1, 1934, of $1,579,381.72. The book costs of the properties were also introduced, ranging from $47,776.749.63, on December 31, 1931, to $49,858,751.23 as of April 30, 1934. Appellant claimed that the books understated the actual costs. There was evidence with respect to the annual accruals to provide for depreciation, depletion and amortization. The operating expenses and revenues were shown for the years 1931, 1932 and 1933, and for the twelve months ending April 30, 1934. In this evidence there was no segregation of appellant's properties or operations as between Texas and Oklahoma or between intrastate and interstate business, appellant insisting that it was entitled to attack the Commission's order upon the same inclusive basis which the Commission had used.

The State insisted that if appellant wished to maintain as a defense that the order was invalid because it sought to regulate operations which were exempt from state control, appellant should make a segregation, first as between its admittedly intrastate operations and those claimed to be interstate, and second, as between

Texas and Oklahoma properties and operations. After the voluminous evidence above mentioned had been taken, appellant, still contending that such an issue was not properly raised as the action under the Texas statute was in the nature of an appeal from the Commission's order which was indivisible, presented evidence based upon "a segregation of its 'integrated operating system' as between interstate and intrastate commerce". Appellant states that this segregation was based "upon the actual use of its properties in the two classes of commerce". The fair value of its ~~interstate~~ intrastate property was thus claimed to be $38,350,882.32 and the net amount available at the Commission's rate for return on intrastate deliveries of gas as less than four per cent. In this segregation appellant's line used in transporting gas from Wheeler County, Texas, in the Panhandle field, through Oklahoma and thence into Texas, was allocated to interstate operations.

In rebuttal, the State offered evidence based upon a different method of segregating appellant's properties and operations. This method proceeded upon the basis of geographical location, that is, there were allocated to Oklahoma and Texas respectively the properties physically located in each State and the revenues and expenses were divided on the same geographical basis. In that way the properties allocated to Texas were valued at $40,256,862.39, and the net revenue which would be available at the Commission's rate was estimated to be, for the last two years of the accounting period, nearly seven per cent. Appellant complains of this appraisal upon the ground that it excluded the production properties located in Texas which appellant claimed had an actual cost of $5,191,539.42 as of March 31, 1934, and that the State substituted therefor an arbitrary and inadequate annual allowance on the basis of the field price for the volume of gas produced.

When the evidence was closed, each party moved that a verdict be directed in its favor and both motions were denied. The court gave to the jury a series of instructions embracing definitions of the terms of "fair return", "fair value", "used and useful"—as applying to the property actually used by appellant in the production, transportation, sale and delivery of natural gas to its customers and also to the property acquired in good faith and held by appellant for use in the reasonably near future in order to

enable it to furnish adequate and uninterrupted service—"operating expenses", "annual depreciation", "reproduction cost new", and "going value". The jury were instructed that the burden of proof was upon the defendant (appellant) "to show by clear and satisfactory evidence" that the rate fixed by the Commission's order was "unreasonable and unjust as to it", and the court explained that by that phrase was meant that the rate prescribed in the Commission's order "was so low as to have not provided for a fair return upon the fair value of defendant's property used and useful in supplying the service furnished by said defendant." With these instructions the court submitted to the jury a single special issue as follows:

"Do you find from the evidence in this case that, as applied to points in Texas, the order of the Railroad Commission of Texas, bearing date of September 13, 1933, providing for a rate of not exceeding 32 cents per thousand cubic feet of gas sold to the distributing companies at the gates of points served, is unreasonable and unjust as to the defendant, Lone Star Gas Company? Answer this question 'yes' or 'no' ".

The jury answered the question "yes". Judgment was entered accordingly enjoining the enforcement of the Commission's rate.

In view of the definition of "fair return" and "unreasonable and unjust" in the court's instructions, we are of the opinion that the issue for the jury to determine was in substance whether the rate was confiscatory. We so regarded a like submission in the case of *United Gas Public Service Company* v. *Texas*, decided February 14, 1938. There the jury's verdict sustained the rate but that fact does not alter the nature of the issue submitted.

Under the state practice the issues of fact were determined in the trial court and on the appeal the Court of Civil Appeals had no authority to make findings of fact. "Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence on a material issue, it has no authority to substitute its findings of fact for those of the trial court". *Post* v. *State*, 106 Tex. 500, 501; *United Gas Public Service Company* v. *Texas*, *supra*.

The Court of Civil Appeals held that the burden was heavily upon the Company (appellant here) to show by clear and satisfactory evidence that the 32-cent rate would not afford a reason-

able rate of return on the property used in the Texas public service, that the Company did not meet "this burden and quantum of proof", and that the trial court erred in overruling the State's motions for an instructed verdict. The court viewed the appeal as presenting two main divisions, (1) certain constitutional objections to the rate order, and (2) the legal sufficiency of the evidence to show that the order was confiscatory or unreasonable and unjust. Under the first division, the court considered that there were three constitutional objections, (a) interference with interstate commerce, (b) interference with the right to contract, and (c) confiscation of property. The court sustained the jurisdiction of the Commission to deal with the operations of appellant and its corporate affiliates in Texas as "a single and integrated business enterprise". On the first two issues abovementioned the court ruled in favor of the State, and on the confiscation issue the court considered that the question whether the prescribed rate would yield a fair return was one of fact and passed to the consideration of the legal sufficiency of the evidence.

Holding that the rate fixed by the Commission was presumed to be valid, and referring to the authorities as to the scope of judicial review, the court set forth the five primary factors essential to the correct determination of the issue, viz., the present fair value of the property of the Company used in the public service, the reasonable annual allowance for depreciation, the reasonably necessary operating expenses, the reasonable operating revenues, and the reasonable rate of return.

But in dealing with the evidence upon these questions, the court applied a different criterion from that adopted by the Commission. The court held that it was necessary to segregate the property used in Texas, as well as that used conjointly in Texas and Oklahoma. The court spoke definitely upon this point, saying—

"Since appellee [appellant here] was engaged in the integrated business of producing, purchasing, transporting and selling natural gas to the distributing companies at the city gates of some 300 cities and towns in Texas and Oklahoma, it became necessary to allocate or segregate the property used in Texas as well as that used conjointly in both states, in order to determine the fair value of the property used in the Texas public service, the annual depreciation thereof, and the Texas operating expenses and revenue".

The court then set forth the different methods of segregation which the parties had adopted. The court said that the State's

method allocated "to Texas operations, or to intrastate commerce the value of all property located within the physical boundary of Texas". The "short section" of pipe line "from Texas Pan handle field across the corner of Oklahoma and back into Texas was also allocated to Texas operations. "Gas sales adjustment" was made by which "Texas or intrastate operations" were charged with the net amount of Oklahoma produced gas for the six-year period 1929 to 1934. The court observed that "no charge against Oklahoma or interstate operations was made for the use of the transmission lines and for equipment within Texas; the effect of which was to give free transportation in Texas of all Oklahoma produced gas". Texas and Oklahoma expenses and revenues "were allocated in general accord with the segregation of the physical properties". The court stated that under that method the fair value "of the property undepreciated used in Texas public service was $40,256,862.39" according to the calculations of the State's experts; and that after deducting operating expenses and annual depreciation "there remained for the last two years of the accounting period, being the two lowest revenue years", Texas net revenue "which would yield a return of 6.74% and 6.76% respectively".

The court then referred to the method of segregation used by the Company by which all the gas produced or purchased in the Texas Panhandle field and transported into Texas, and all Oklahoma produced gas, were allocated to interstate commerce; that the allocation was made by a determination of the specific gravity of the Oklahoma and Texas Panhandle gas on the one hand and the West Texas gas with which it was commingled in pipe lines on the other; that the Company had allocated operating expenses and revenue between the two States upon substantially the same basis; and that in this manner the fair value of the property used in the Texas public service on the basis of reproduction cost new, less depreciation, was said to be $38,350,882.32. The court held that gas from the Texas Panhandle field did not move in interstate commerce and hence that the testimony of the Company's experts was based upon an erroneous assumption and "proved nothing material to this case"; that the Company had offered no other proof upon a correct segregation or allocation of the property, and that the trial court had erred in refusing the State's motion for an instructed

verdict and for a judgment declaring the rate order "to be valid in every respect".

The court's specific ruling upon this point is shown by the following statement of its conclusion:

"The burden was upon appellee to show by clear and satisfactory evidence a proper segregation of interstate and intrastate properties and business, and to show the value of the property employed in intrastate business or commerce and the compensation it would receive under the rate complained of upon such valuation. Having failed to make a proper segregation of interstate and intrastate properties, appellee did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust".

The court adverted to the effect of the difference in theory in the two methods of segregation "with respect to the fair value of the property used in Texas public service, the annual depreciation thereof, and particularly as to the operating expenses and revenues". The court characterized the annual depreciation allowances as speculative and plainly excessive. The court said that with respect to operating expenses, except as to a few controverted items, and with respect to revenues, there was no substantial difference in the testimony "as to totals of both Texas and Oklahoma for the years of the accounting period" but that the same controversy arose "as to a proper segregation of such expenses and revenues to each State"; and since, as already pointed out, the Company had "failed to make proper segregation of the expenses and revenues, it failed to prove its case".

The court then criticised certain items of operating expenses as contrary to the actual experiences of the Company or so large as to be excessive upon their face, referring in particular to the items of "federal taxes", management fees charged by the holding corporation, new business expenses, canceled and surrendered leases, regulatory commission and general expenses, and going value. The court also took the view that no reason existed why a six per cent. rate of return should be declared confiscatory.

That the judgment of reversal was rested upon the proposition that there was a failure of proof on the issue of confiscation by reason of the fact that the Company had failed to make a proper segregation of its interstate and intrastate properties and operations is fully confirmed by the further opinion of the court in

denying the Company's motion for a rehearing, when the court said:

"We held that as a matter of law appellee failed to establish by clear and satisfactory evidence the ultimate fact issue, to wit: Whether the rate fixed by the Commission was so low as not to afford a reasonable return on the fair value of the property used in the Texas public service. Appellee was afforded a seven months hearing before the Commission and a three months trial on appeal to the court. It made no segregation as between its Texas and Oklahoma properties and operations; and did not prove the fair value of the property used in the Texas public service. The question of the value of such property determines the reasonableness of the rate and probably, in the ultimate analysis, adequacy of service and principles of financing".

The Court added that the valuation of such public service property was in the main a matter of estimate or opinion; that a scientific standard of absolute value was unattainable; and that because of this uncertainty, except where the evidence clearly shows gross over or under valuation, or "mistake, inequality or fraud" in the appraisal, the finding of value by an administrative commission is generally given finality and that this especially was the rule in the absence of an actual test under the new rate.

First.—We agree with the state court that the Commission's order did not violate the constitutional rights of appellant under the commerce clause.

The Commission did not attempt to regulate the interstate transportation of gas. Compare *Hanley* v. *Kansas City Southern Rwy. Co.*, 187 U. S. 617; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17; *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404. Nor, in view of the circumstances in the instant case, can it be said that the Commission was undertaking to regulate sales and deliveries of gas in interstate commerce. Compare *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41; *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561. The distributing companies in Texas, with the exception of those at Waxahachie and Gainesville (the amount of deliveries there being negligible in comparison with appellant's total gas business), are appellant's affiliates. The Lone Star Gas Corporation, organized in Delaware, holds more than 99 per cent.

of the capital stock of appellant and owns or controls a like proportion of the capital stock of the distributing companies. Thus, the latter companies and appellant are but arms of the same organization doing an intrastate business in Texas and the Commission was entitled to ascertain and determine what was a reasonable charge for the gas supplied through this organization to consumers within the State. *Western Distributing Company* v. *Public Service Commission,* 285 U. S. 119, 124; *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U. S. 290, 295; *American Telephone & Telegraph Co. v. United States,* 299 U. S. 232, 239. It appears that there were pending before the Commission proceedings involving the reasonableness of the rates charged by the distributing companies to consumers in many communities in Texas, and in relation to those proceedings the Commission found it necessary to determine what would be a reasonable charge for the gas delivered by appellant to the distributing companies at the "city gates". It was obviously to the convenience of both the Commission and appellant that this essential factor should be ascertained in a single proceeding and the Commission's investigation, which led to the order now in question, was undertaken to that end. We think that appellant's sales and deliveries of gas in Texas to the distributing companies must be regarded as an essential part of the intrastate business in the conduct of which the appellant and the distributing companies were virtual departments of the same enterprise.

Appellant's pipe line from the Texas Panhandle field in Wheeler County led from production properties in Texas to distributing points in the same State. The fact that the line cut across a corner of Oklahoma did not make it any the less a part of the system serving Texas gas to communities in Texas. In ascertaining what would be a reasonable rate of charge for this Texas gas supplied to Texas consumers, it was not only fair but manifestly necessary to take into account the value of the production properties in Texas from which the gas was taken and also the value of the transmission line by which the gas was brought to the city gates of the Texas communities. It is futile to contend that in making its calculations on that basis, the Commission was regulating interstate transportation or imposing any burden upon interstate commerce. The *Hanley, Speight* and *Stroud* cases, *supra,* upon which appellant relies, are not in point. In seeking

to assure a just determination of a reasonable charge for the sales and deliveries in the intrastate business in Texas, the State was protecting its local interests and its action was not in conflict with any federal regulation. *Minnesota Rate Cases,* 230 U. S. 352, 402.

We think that the value of the pipe line from the Texas Panhandle field was properly included by the Commission in the rate base.

With respect to the gas produced or purchased by appellant in Oklahoma and transported by its pipe lines to Texas, the state court observed that the Oklahoma gas was run through extraction plants in Texas, leaving the residue gas changed in its composition and with its heating value lowered; that large amounts of the Oklahoma gas were run through and stored in wells in Texas; that, passing into appellant's pipe line system, that gas was commingled with Texas gas and divided and redivided until it was impossible to trace or identify it by volume at any city gate of delivery; that at various points before delivery its pressure was reduced and the gas allowed to expand; and that the amount of Oklahoma gas as a whole was negligible in comparison with the amount of the Texas gas with which it was mixed. Appellant refers to the testimony of its witness that the composition of the gas, after certain heavy hydro-carbons were removed at the gasoline plants, remained practically the same, that its forward movement was not stopped, and that not all of the gas coming from Oklahoma was stored in Texas. Appellant also contends that the state court erred in saying that only about four per cent. of its total gas came from Oklahoma, insisting that the correct figure was about eleven per cent. The discrepancy is apparently explained by the fact that the state court's figure was taken from the results of the year 1933 while that of the appellant is for the five years of its accounting period. It would seem, however, that the amount of the gas transported from Oklahoma into Texas was at a diminishing rate. Aside from that, we think that the proved manner in which the gas from Oklahoma was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in appellant's intrastate business and that the Commission was entitled so to consider it in fixing its rate.

It is in this light that the inclusion by the Commission in its calculations of appellant's producing properties in Oklahoma and its transmission lines to Texas must be considered. The purpose

of these calculations was to give proper credit to appellant for its investment and operating expenses in determining a rate for the gas sold and delivered in Texas. The Commission did not attempt to fix a rate for gas supplied to Oklahoma communities and did not impinge upon the jurisdiction of Oklahoma. There is no ground for concluding that the Commission's method of calculation either created any burden upon interstate commerce or operated to appellant's injury in relation to its intrastate business in Texas. Not only is the contrary a fair inference from the fact that appellant raised no objection to this method before the Commission, but the State points to the evidence which appears to show that the Oklahoma operations were more expensive than those in Texas and that the Commission's calculations actually produced a result more favorable to appellant than one which would have followed any segregation. Appellant does not successfully meet this contention.

Second. Concluding that appellant had no tenable objection to the method adopted by the Commission in treating appellant's property as an integrated operating system, and making its findings as to value, expenses, and revenues accordingly, for the purpose of determining the fair rate for the gas sold and delivered in Texas, we come to the issue of confiscation.

The Commission's order was presumptively valid, as the state court held, but it was open to attack in this action under the state statute. Appellant was entitled to present evidence to rebut the Commission's findings of value, operating expenses, revenues and return, upon which the order rested. Appellant presented much testimony and elaborate statistical data for that purpose, treating its property and business as the Commission had treated them. Appellant claimed that this evidence showed a far higher value for its properties than the Commission had allowed and that the rate imposed was confiscatory. The trial court submitted that evidence to the jury, under a proper instruction as to the burden of proof resting upon appellant, and the jury found in appellant's favor.

The Court of Civil Appeals reversed the judgment upon a distinct ground. That was that appellant had not sustained its burden of proof because it had failed to make "a proper segregation of interstate and intrastate properties and business". Thus,

the necessity for that segregation was made the criterion. That is clearly shown both from the court's main opinion and its opinion upon rehearing from which we have quoted. "Having failed to make a proper segregation of interstate and intrastate properties", said the court, "appellee [appellant here] did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust".

We think that this ruling as to the necessity of segregation, and that the sufficiency of appellant's evidence should be determined by that criterion, was erroneous. This was not a case where the segregation of properties and business was essential in order to confine the exercise of state power to its own proper province. Compare *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, 148, 149. Here, as we have seen, the Commission in its method of dealing with the property and business of appellant as an integrated operating system did not transcend the limits of the state's jurisdiction or apply an improper criterion in its determinations. But if in the circumstances shown the Commission was entitled to make its findings with respect to appellant's property and business upon the basis it adopted in order to fix a fair rate for the sales and deliveries in Texas, appellant was entitled to assail those findings upon the same basis. If the findings of the Commission as to value and other basic elements were to be taken as presumptively correct and appellant could not succeed save by overcoming those determinations by clear and convincing proof, appellant could not be denied the right to introduce evidence as to its property and business as an integrated system and to have the sufficiency of its evidence ascertained by the criterion which the Commission had properly used in the same manner in reaching its conclusion as to the Texas rate. Neither the fact that appellant, because of the insistence of the State that the property and business should be segregated, finally introduced evidence for that purpose, nor the inadequacy of its method of segregation, could detract from the force of the proof it had already submitted in direct rebuttal of the Commission's findings. The effort at segregation came after voluminous testimony had been taken which fully presented appellant's case with respect to the value of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate. This proof could

not be ignored because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the Commission's order. The first and primary ground remained and the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury.

The judgment of the Court of Civil Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice BLACK dissents.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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